No. 88-725

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In the
Supreme Court of the United States

OCTOBER TERM, 1988

CLAMP-ALL CORPORATION,
PETITIONER,

v.

CAST IRON SOIL PIPE INSTITUTE, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

Respondents' Brief in Opposition to Petition for a Writ of Certiorari

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Respondents the Cast Iron Soil Pipe Institute ("CISPI"), Anaheim Foundry Company, Charlotte Pipe & Foundry Company, The Eastern Foundry Company, Jones Manufacturing Company, Inc., and United States Pipe and Foundry Company, Inc. oppose the petition of Clamp-All Corporation ("Clamp-All") for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case. In opposition to Clamp-All's petition, respondents jointly file this brief.

Argument

PETITIONER'S ARGUMENTS RELATE ONLY TO THE SUFFICIENCY OF ITS TRIAL EVIDENCE, A MATTER ALREADY EXAMINED AT LENGTH AND NOT WORTHY OF CERTIORARI IN THIS "HIGHLY FACT-BASED" CASE

Petitioner seeks a grant of certiorari to obtain further review of what petitioner asserts are two aspects of the rulings below: (1) a "presumption" the Court of Appeals allegedly adopted with respect to the antitrust implications of a private product standard, and (2) the determination that petitioner's trial evidence in this "highly fact-based" case was insufficient to survive a motion for a directed verdict at the close of petitioner's case, Petitioner's Appendix ("Pet. App.") 2a. As respondents detail below, the "presumption" that petitioner finds in the First Circuit's opinion is a creature of petitioner's own misreading of that opinion. The only ruling on this point, by both the trial court and the First Circuit, was that petitioner's evidence, examined in accordance with hornbook antitrust standards, was simply insufficient.

Once petitioner's first argument is properly framed, it is apparent that both issues raised by petitioner relate to nothing more than the sufficiency of the evidence. The writ of certiorari exists to resolve substantial federal and constitutional questions, not to afford a petitioner yet a third opportunity to convince a court that somewhere in the trial record can be found sufficient evidence on some contention to warrant consideration of the issue by a jury. The petition should be denied and this protracted, burdensome proceeding brought to an end.

A. The First Circuit Adopted No "Presumption" Regarding Private Product Standards

In an effort to raise an issue other than the sufficiency of the evidence, petitioner asserts that the First Circuit adopted a "new rule of per se legality for private standards that exclude competing products." Petition at 8. A review of the First Circuit's opinion reveals that it adopted no such rule. To the contrary, the court simply applied orthodox rule of reason analysis to the evidence submitted at trial concerning a private standard established by CISPI, CISPI Designation: 310. The court stated: (i) that " 'legitimate' standard-setting activity" has competitive benefits; (ii) that a plaintiff is entitled to adduce evidence that "the standard setting at issue serves no legitimate purpose, or . . . is unnecessarily harmful" and (iii) that *petitioner submitted insufficient evidence* to raise a triable issue concerning its assertions. Pet. App. 15a-16a. Stated simply, petitioner's claim failed at trial, not because some novel liability or evidentiary standard was applied, but because petitioner failed to back up its allegations with cognizable evidence.

Moreover, far from applying a *per se* rule or "presumption," as petitioner contends, Petition at 7, 8, the court carefully analyzed the *evidence in the record*, including the following:

(a) The private standard at issue was created, not by a "general certifying organization," Pet. App. 16a, but by a private trade association, CISPI, in order to establish a generic denomination which would allow purchasers "to determine whether a particular coupling is, in fact, (generically considered) a CISPI coupling." Pet. App. 14a.

(b) The standard, *on its face*, advises users of the existence of competing products and disavows any commentary on such competing products. Pet. App. 14a, 16a.

(c) There was "*no testimony*" (emphasis added) that buyers of the product, "builders, plumbers or contractors — reason-

ably sophisticated users," Pet. App. 16a, were in any respect misled into thinking that the respondents' trade association was a "general certifying organization" whose failure to certify petitioner's "quite different product" reflected adversely or otherwise on that product. Pet. App. 16a.

In sum, it is petitioner that, having no evidence to support its claim, is seeking the adoption of a *per se* rule. The ruling of the First Circuit creates no new issue of law for this Court to review. Petitioner's first argument, like its second contention, does no more than invite this Court to review and redetermine the sufficiency of the evidence.

B. Petitioner's Contentions Were Fully and Properly Considered Below; Further Review Is Unwarranted

Petitioner's "fourteen volumes of record," Pet. App. 22a, have now been reviewed, in detail, by two courts. The opinions below are noteworthy for their patient and painstaking efforts to review the facts in support of each of petitioner's scattershot allegations and for their thorough explanations as to how, for each allegation, petitioner's proof fell short.

The District Court, Zobel, J., presided over thirteen days of jury trial of petitioner's case. Through the course of the trial, the District Court became intimately familiar with the evidence submitted by petitioner and the inferences that petitioner argued could reasonably be drawn therefrom. The District Court's opinion establishes that it employed the proper standards for ruling on the motion for directed verdict, Pet. App. 31a-33a, and that its ruling was well-reasoned, fully grounded in the record, and correct.

The Court of Appeals then afforded petitioner a second comprehensive review of its facts and contentions. Contrary to the conclusory assertions in the Petition, the appellate court

employed the proper legal standard, "assum[ing] a set of facts as favorable to Clamp-All, in respect to each charge, as the evidence will reasonably permit." Pet. App. 4a. Its analysis of the facts, which reflects an extensive review of the record, reaches the only possible conclusion — that sufficient evidence of an antitrust violation was not submitted.

Absent exceptional circumstances, this Court will not review lower court rulings on the sufficiency of the evidence. *Houston Oil Co. of Texas* v. *Goodrich*, 245 U.S. 440, 441 (1918). The sufficiency of the evidence adduced by petitioner is a subject of interest only to the litigants herein, and thus does not present a question worthy of consideration by this Court. *See Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 & n.2 (1955); *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Moreover, this Court has consistently declined to undertake what is essentially a fact-finding or fact evaluation mission where two courts below, in accordance with the proper legal standards, have reached concurrent conclusions. *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).[1] Because petitioner's claims have been fully aired in prior proceedings, and in light of the well-established and prudent practice of this Court not to grant further review to insular controversies over the sufficiency of the evidence, no writ of certiorari should issue.[2]

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[1] At various points, petitioner asserts that the jury was not permitted to hear certain evidence. Petition at 4, 11. Petitioner has confused the issue of admissibility of evidence with the issue of sufficiency of evidence. The lower courts ruled that the admitted evidence, taken together, simply did not afford a basis upon which a reasonable jury could find an antitrust violation, and that entry of a directed verdict was therefore appropriate. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250-52 (1986).

[2] Because respondents do not view this Court as being an appropriate forum for a point-by-point reargument on the significance of the facts heard below, respondents do not attempt herein to reply to each factual assertion contained in the Petition. Respondents' failure to quarrel herein with any particular

C. The Courts Below Were Correct in Ruling That Petitioner's Evidence Was Insufficient

Outside of the ruling as to the competitive significance of CISPI Designation: 310, which is addressed above, petitioner challenges the lower court rulings as to the sufficiency of the evidence on three issues: (1) the American Society of Sanitary Engineers ("ASSE") proceedings; (2) respondents' advertising; and (3) market power. As to each issue, it is plain that petitioner has either misunderstood, misconstrued or simply ignored the opinions and evidence below.

1. *The ASSE Proceedings*

As set forth in the opinions below, the ASSE, a standard-setting organization in the plumbing field, formed a subcommittee to write a standard for a product, the hubless coupling, which was marketed by both petitioner and respondents. Pet. App. 18a. Both petitioner and CISPI submitted proposed standards to the subcommittee. *Id*. CISPI's proposed standard was never alleged to have excluded petitioner's product. Pet. App. 18a, 31a. CISPI's proposed standard was accepted by the subcommittee and forwarded to the ASSE. The ASSE rejected CISPI's proposal and decided not to adopt *any* standard. Pet. App. 18a.

The Court of Appeals ruled that there was "no concrete evidence in the record that CISPI acted improperly" with respect to the ASSE. Pet. App. 18a. Petitioner asserts that it did have such evidence in two respects. First, it characterizes CISPI's proposal as being so meaningless as to constitute a bad faith proposal. Second, it asserts that CISPI "packed" the meeting at which the parties' proposals were voted on.

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statement made in petitioner's Statement of the Case should not be misconstrued as agreement therewith; in fact, respondents view much of petitioner's Statement of the Case as being incorrect and unsupported by the record.

These assertions were properly viewed by the courts below as not being supported by evidence sufficient to take this claim to the jury. With respect to the nature of CISPI's proposed standard, the trial court ruled, *inter alia*, that there was "*no evidence* before us by which we could judge what that standard really means." Pet. App. 31a (emphasis added).[3] More fundamentally, the First Circuit ruled that, whether CISPI's standard was good, bad or indifferent, there was no evidence that the standard had any *effect* on petitioner because there was "no[] . . . concrete evidence that the submission of CISPI's proposal caused (or even influenced) ASSE's decision not to adopt any standard." Pet. App. 18a. With respect to the purported "packing" of the meeting, the First Circuit concluded that the jury could not find unfair overrepresentation by CISPI where the record evidence showed, *inter alia*, that only six of the sixteen ASSE subcommittee members were CISPI members. Pet. App. 18a. In these circumstances, petitioner's analogy to *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. , 108 S. Ct. 1931 (1988), is inapt. The First Circuit properly applied *Indian Head* to the facts herein and found no antitrust violation.[4]

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[3] Footnote 19 to the Petition addresses the arcane issue of whether CISPI's proposal constituted a "performance standard." The footnote provides a plain illustration of the technical issues with which the trial court was confronted without any expert testimony to aid it. Even now, petitioner relies in footnote 19 on evidence which it admits was excluded at trial, despite the fact that petitioner took no issue with that evidentiary ruling, either on appeal or in its instant petition.

[4] Moreover, *Indian Head* addressed the applicability of *Noerr-Pennington* protection for private lobbying efforts; it expressly did not reach issues as to the illegality of the substantive petitioning conduct involved in the case. 108 S. Ct. at 1936 & n.3. *Indian Head* is not pertinent to this case because neither the district nor the appellate court relied upon any constitutional privilege in their rulings as to the ASSE proceedings. Pet. App. 16a-19a; 30a-32a. Both courts found against petitioner with respect to this issue because petitioner did not come forward with sufficient evidence to raise a triable issue under the antitrust laws.

2. *Respondents' Advertising*

Petitioner alleged that CISPI advertised the CISPI coupling as being superior to competing products and that these advertised claims of superiority were false. The Court of Appeals ruled that, "without more evidence," mere claims of product superiority, especially when made to a "technical audience," were "mere 'sellers' talk.'" Pet. App. 19a.[5] The First Circuit further held that there was insufficient evidence to allow a jury to find that this advertisement was false. With respect to petitioner's claim that various product failures proved the falsity of respondents' assertions of superiority, the Court of Appeals stated that the record contained no evidence of failures of hubless couplings, but only evidence of failures of other of respondents' products. Pet. App. 20a. Petitioner's evidence that its product out-performed respondents' product in a particular laboratory test was also deemed insufficient because findings as to the relative performance of the two couplings "did not show that CISPI's coupling was defective." Pet. App. 20a.

3. *Market Power*

Petitioner alleges that the testimony of its expert that CISPI and its members had market power was sufficient to warrant submission of the market power issue to the jury. Petitioner fails to note that this testimony was left totally lacking in foundation when the trial court excluded the expert's entire analysis of market share because the expert "based his opinion significantly upon a few unmemorialized telephone calls, and

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[5] The First Circuit also stated that it viewed the false advertising claims as constituting "charges of state-law business torts, not violations of the federal antitrust laws." Pet. App. 19a. However, the court "assume[d] that point aside" and treated the false advertising allegations on their merits. *Id.*

[admitted to] estimat[ing] the reliability of his model as between '1 percent and 99 percent.'" Pet. App. 22a. The trial court's exclusion of this evidence was, as the Court of Appeals held, entirely proper.[6]

[6] Petitioner's argument that respondents' market power may be proven merely by regarding the difference between the parties' respective market shares in Massachusetts and their market shares in the rest of the country is plainly flawed. As the Court of Appeals pointed out, petitioner controlled about 65 percent of the coupling market inside Massachusetts, "where Clamp-All had a monopoly for several years because only its coupling met the state's performance standard." Pet. App. 4a.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November, 1988

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Appendix A

STATEMENT REQUIRED BY RULE 28.1

1. *Anaheim Foundry Company*

Anaheim Foundry Company has no parent companies, affiliates or subsidiaries.

2. *Cast Iron Soil Pipe Institute*

The Cast Iron Soil Pipe Institute has no parent companies, affiliates or subsidiaries.

3. *Charlotte Pipe & Foundry Company*

Charlotte Pipe and Foundry Company, N.E.
Charlotte Pipe and Foundry Company, S.W.

4. *The Eastern Foundry Company*

Peerless Heater Company
Peerless Industries, Inc.

5. *Jones Manufacturing Company, Inc.*

Clearbrook, Inc.
J.P. Manufacturing, Ltd.
Jones Acquisition, Ltd.
The Jordan Company

6. *United States Pipe and Foundry Company, Inc.*

Hillsborough Holdings Corporation
Apache Holdings Corporation
Basins, Inc.
Basins of Toledo, Inc.
Best Insurors, Inc.
Best Insurors of Mississippi, Inc.
Black Warrior Methane Corporation
Black Warrior Transmission Corporation

Broadnax Jewelry Company
Casting Holdings Corporation
Celotex Inoue (Japan) Corporation
Cherokee Holdings Corporation
Coast to Coast Advertising, Inc.
Computer Holdings Corporation
D.J. Dinsmore Co.
Dixie Building Supplies, Inc.
The Georgia Marble Company
The Georgia Marble Land Company
Hamer Holdings Corporation
Homes Holdings Corporation
JW Aluminum, Inc.
JW Resources Holdings Corporation
JW Window Components, Inc. (DE.)
JWI Holdings Corporation
J.W. Walter, Inc. (DE.)
J.W. Walter, Inc. (FL.)
Jefferson Warrior Railroad Company, Inc.
Jim Walter Computer Services, Inc.
Jim Walter Homes, Inc.
Jim Walter Insurance Services, Inc.
Jim Walter Resources, Inc.
Jim Walter Window Components, Inc. (WI.)
Jimco Stone Centers, Inc.
Land Holdings Corporation
Mid-State Holdings Corporation
Mid-State Homes, Inc.
NS Holdings Corporation
Oil Holdings Corporation
Railroad Holdings Corporation
Sanford Holdings Corporation
Shore Oil Company
Sloss Industries Corporation

Southern Precision Corporation
United Land Corporation
U.S. Pipe Realty, Inc.
Vestal Manufacturing Company
Walter Home Improvement, Inc.
Walter Industries, Inc. (2 volumes)
Walter Land Company
Warren Industries, Inc.
Wedlo, Inc.